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T-Smart Sdn Bhd v Desa Watan Sdn Bhd (Chua Hui Sen, third party)

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-700–05 OF 2012
MARY LIM J
29 AUGUST 2014

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Contract — Claim — Claim for moneys owing — Breach — Building contract — Recovery of sum — Letter of undertaking — Whether letter of undertaking stipulated that defendant agreed to pay plaintiff if subcontractor failed to pay plaintiff — Whether there was issuance of such letter — Whether letter was fraud and/or fraudulently issued — Whether signatory of letter of undertaking authorised to sign on behalf of defendant

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The plaintiff's claim against the defendant was for the outstanding sum of RM2,412,738.71 allegedly due from the supply and delivery of building materials by the plaintiff to the defendant's building site which comprised of door frames with hinges and industrial diesel. According to the plaintiff, at the material time, the defendant had been awarded a project to build an apartment ('the said project'). The defendant had appointed a subcontractor company known as HK Jaya Sdn Bhd ('HK Jaya') to carry out the said project. HK Jaya ordered building materials from the plaintiff which the plaintiff duly supplied to the site of the said project. The plaintiff claimed that HK Jaya was unable to pay the plaintiff a sum of more than RM500,000 because the defendant did not fully pay HK Jaya. Consequently, the plaintiff was reluctant to continue supplying HK Jaya with the building materials. The plaintiff claimed that the defendant approached the plaintiff requesting that the plaintiff do continue supplying to the site; otherwise the said project would be unduly delayed. After much persuasion from the defendant, the plaintiff claimed that it agreed on condition that the defendant guaranteed or undertook to pay HK Jaya's debts. The defendant was said to have issued a letter where the defendant agreed or undertook to pay the plaintiff up to the sum of RM2.5m in the event HK Jaya failed to pay the plaintiff. When HK Jaya failed to settle the said sum, the plaintiff, relying on the said letter of undertaking, sought payment from the defendant which the latter refused. The present suit is for the recovery of that sum based on that letter of undertaking. The defendant denied issuance of such letter and alleged that the said letter was a fraud on the defendant and/or it was fraudulently issued. The defendant, inter alia, alleged that the said letter was not written on its proper letterhead; the signatory of the said letter of undertaking, Chua Hui Sen, was not a director of the defendant and was not authorised to sign on behalf of the defendant. The primary issue here

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concerned the validity of that purported letter of undertaking.

Held, dismissing the claim and allowing the counterclaim:

(1) The plaintiff bore the burden of proving that the letter of undertaking was indeed signed by the person whose name appears in the letter. Here, Chua Hui Sen was said to have signed as a director of the defendant. The plaintiff must prove that there was such a person by this name; and that the person is a director of the defendant. This must be done so that the plaintiff may be said to be going about establishing its case against the defendant (see para 35).

(2) All that a party needed to do was call Chua Hui Sen herself to testify. She did not because she was not called or subpoenaed. She ought to have been called by the plaintiff. The plaintiff did not call her and no explanations were forthcoming in this regard. All that the plaintiff said was that the court ought to accept the testimony of PW1 *in toto* because he is an independent witness by virtue of the fact that he is a subpoenaed witness (see para 36).

(3) Upon careful evaluation of the oral and documentary evidence before the court, the court agreed with the defendant's case and found that the letter of undertaking was indeed forged. The examination of signatures in particular, was not an exact science. It is a matter of opinion that even the court can form and conclude. This is in accordance with s 51 read together s 67 of the Evidence Act 1950 (see paras 28 & 61).

(4) Amongst the persons who allegedly attended that fateful meeting were PW3 and PW4. Yet, none of them saw Chua Hui Sen at that meeting. In fact, they do not even know who she was. It was palpable that even PW1, father of Chua Hui Sen did not say that his daughter attended the meeting referred to in the opening paragraph of this letter. Aside from this, the other attendees at the meeting categorically and confidently testified that Chua Hui Sen did not attend the meeting referred to in the opening paragraph of this letter (see para 78).

(5) Since this letter is more in the nature of a follow up from a meeting already held between the parties, it would be reasonable to say that the contents of the letter and the intention of the letter must have been to confirm what transpired at the meeting. Given that Chua Hui Sen did not attend the meeting, as testified by the plaintiff's own witnesses, then the very object of the letter fails. There can be no confirmation by a person who never attended the meeting in the first place (see para 79).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah untuk jumlah perlu dibayar sebanyak RM2,412,738.71 yang dikatakan terhutang daripada pembekalan

dan penghantaran bahan binaan oleh plaintif ke tapak bangunan defendan yang terdiri daripada bingkai pintu dengan engsel dan diesel industri. Menurut plaintif, pada masa material, defendan telah diawardkan satu projek untuk membina sebuah apartmen ('projek tersebut'). Defendan melantik sebuah syarikat subkontraktor yang dikenali sebagai HK Jaya Sdn Bhd ('HK Jaya') untuk menjalankan projek tersebut. HK Jaya memesan bahan binaan daripada plaintif di mana plaintif dibekalkan dengan sewajarnya untuk tapak projek tersebut. Plaintif mendakwa bahawa HK Jaya tidak boleh membayar kepada plaintif jumlah melebihi RM500,000 kerana defendan tidak membayar sepenuhnya kepada HK Jaya. Sehubungan dengan itu, plaintif enggan untuk terus membekalkan HK Jaya dengan bahan binaan. Plaintif mendakwa bahawa defendan menemui plaintif dan meminta bahawa plaintif terus memberi bekalan ke tapak; jika tidak projek tersebut akan mengalami kelewatan. Selepas dipujuk oleh defendan, plaintif mendakwa bahawa ia bersetuju dengan syarat bahawa defendan menjamin atau mengakujanji untuk membayar hutang HK Jaya. Defendan dikatakan mengeluarkan sepucuk surat di mana defendan bersetuju atau mengakujanji untuk membayar plaintif sehingga jumlah sebanyak RM2.5 juta sekiranya HK Jaya gagal untuk membayar plaintif. Apabila HK Jaya gagal untuk menyelesaikan jumlah tersebut, plaintif, bergantung kepada surat akujanji tersebut, menuntut bayaran daripada defendan namun defendan enggan. Guaman ini adalah untuk mendapatkan jumlah tersebut berdasarkan surat akujanji. Defendan menafikan mengeluarkan surat sebegitu dan mendakwa bahawa surat tersebut merupakan penipuan kepada defendan dan/atau dikeluarkan secara palsu. Defendan, antara lainnya, mendakwa bahawa surat tersebut tidak ditulis menggunakan kepala surat yang betul; penandatangan untuk surat akujanji tersebut, Chua Hui Sen, bukanlah pengarah kepada defendan dan tidak diberi kuasa untuk menandatangan bagi pihak defendan. Isu utama di sini berkenaan kesahan surat akujanji tersebut.

Diputuskan, menolak tuntutan dan membenarkan tuntutan balas:

(1) Plaintif mempunyai beban membuktikan bahawa surat akujanji tersebut sememangnya ditandatangani oleh orang yang namanya tercatat dalam surat tersebut. Di sini, Chua Hui Sen dikatakan telah menandatangan sebagai seorang pengarah kepada defendan. Plaintif perlu membuktikan bahawa terdapat seseorang yang dikenali dengan nama ini; dan bahawa orang tersebut merupakan pengarah kepada defendan. Ini hendaklah dilakukan supaya plaintif boleh dikatakan membuktikan kesnya terhadap defendan (lihat perenggan 35).

(2) Apa yang sebuah pihak perlu lakukan adalah memanggil Chua Hui Sen sendiri untuk memberi keterangan. Dia tidak berbuat demikian kerana dia tidak dipanggil atau disepina. Dia sepatutnya telah dipanggil oleh plaintif. Plaintif tidak memanggilnya dan tiada penjelasan diberikan berhubung perkara ini. Apa yang dikatakan oleh plaintif adalah bahawa

mahkamah seharusnya menerima keterangan PW1 sepenuhnya kerana dia merupakan seorang saksi bebas berdasarkan fakta bahawa dia merupakan saksi yang disepina (lihat perenggan 36).

(3) Selepas menilai secara teliti keterangan lisan dan dokumentari yang dikemukakan di hadapan mahkamah, mahkamah bersetuju dengan kes defendan dan mendapati bahawa surat akujanji tersebut sememangnya palsu. Pemeriksaan tandatangan khususnya, bukanlah sains yang muktamad. Pemeriksaan itu merupakan perkara berkaitan pendapat, malah mahkamah boleh membentuk dan memutuskannya. Ini menurut s 51 dibaca bersama s 67 Akta Keterangan 1950 (lihat perenggan 28 & 61).

(4) Di antara orang yang dikatakan menghadiri mesyuarat yang malang tersebut adalah PW3 dan PW4. Namun, tiada seorangpun yang melihat Chua Hui Sen pada mesyuarat tersebut. Sebenarnya, mereka sendiri tidak mengetahui siapa orang tersebut. Adalah amat ketara bahawa malah PW1, ayah kepada Chua Hui Sen tidak mengatakan bahawa anak perempuannya akan menghadiri mesyuarat tersebut, merujuk kepada perenggan awal surat ini. Selain daripada itu, orang lain yang hadir di mesyuarat tersebut secara mutlak dan dengan yakin memberi keterangan bahawa Chua Hui Sen tidak menghadiri mesyuarat yang dirujuk dalam perenggan pertama surat ini (lihat perenggan 78).

(5) Memandangkan surat ini lebih bercirikan susulan daripada mesyuarat yang telah diadakan di antara pihak-pihak, adalah munasabah untuk mengatakan bahawa kandungan dan niat surat tersebut adalah untuk mengesahkan apa yang berlaku dalam mesyuarat itu. Memandangkan Chua Hui Sen tidak menghadiri mesyuarat tersebut, seperti keterangan oleh saksi plaintif sendiri, maka tujuan sebenar surat tersebut gagal. Tidak akan ada pengesahan oleh orang yang tidak pernah menghadiri mesyuarat tersebut pada mulanya (lihat perenggan 79).]]]]]

Notes

For cases on claim for moneys owing, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3760–3766.

Cases referred to

SBB Securities Sdn Bhd v Chan Kwan Foong [2013] 5 CLJ 590, CA (refd)
Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2010] 1 MLJ 85, CA (refd)

Legislation referred to

Companies Act 1965 s 218
Evidence Act 1950 ss 51, 67

Eric T S Lai (Taneswaran a/l Palaramen with him) (Lai & Assoc) for the plaintiff.
Ho Kee Tong (Gan, Ho & Razlan Hadri) for the defendant.

Mary Lim J:

SOME BACKGROUND FACTS

[1] The plaintiff's claim against the defendant is for the outstanding sum of RM2,412,738.71 allegedly due from the supply and delivery of building materials by the plaintiff to the defendant's building site at Kawasan Bandar VIII in Daerah Melaka Tengah. The building materials comprised door of frames with hinges and industrial diesel.

[2] According to the plaintiff, at the material time, the defendant had been awarded a project to build '4 pangsapuri kos rendah setinggi 17 tingkat, sebuah surau, sebuah medan selera, 3 kebuk sampah dan sebuah pondok pengawal di atas lot 162, Kawasan Bandar VIII, Daerah Melaka Tengah' for Yayasan Melaka ('the said project'). The defendant had appointed a company known as HK Jaya Sdn Bhd ('HK Jaya') to carry out the said project. HK Jaya was the defendant's subcontractor.

[3] HK Jaya ordered building materials from the plaintiff which the plaintiff duly supplied to the site of the said project. The plaintiff claimed that HK Jaya was unable to pay the plaintiff a sum of more than RM500,000 because the defendant did not fully pay HK Jaya. Consequently, the plaintiff was reluctant to continue supplying HK Jaya with the building materials.

[4] The plaintiff claimed that the defendant approached the plaintiff requesting that the plaintiff do continue supplying to the site; otherwise the said project would be unduly delayed. After much persuasion from the defendant, the plaintiff claimed that it agreed on condition that the defendant guaranteed or undertook to pay HK Jaya's debts. At para 6 of the statement of claim, the defendant is said to have issued a letter dated 11 August 2009 wherein the defendant agreed or undertook to pay the plaintiff up to the sum of RM2.5m on or before 30 May 2010 (this date should read as 30 May 2011 — see letter of undertaking) in the event HK Jaya failed to pay the plaintiff (said letter of undertaking). The plaintiff claimed that based on the 'galakan yang diberikan oleh Defendan apabila Defendan bersetuju untuk membayar hutang syarikat tersebut', the plaintiff continued to supply building materials to the defendant's project site. The plaintiff claimed to have supplied materials up to the sum of RM2,412,738.71.

[5] When HK Jaya failed to settle the said sum, the plaintiff, relying on the said letter of undertaking, sought payment from the defendant. The defendant refused. The present suit is for the recovery of that sum based on that letter of undertaking.

[6] While it admitted that it had awarded the said project to HK Jaya vide letter of award dated 15 March 2008 (see pp 1–7 in Bundle A6) which letter of award was subsequently amended and modified by supplementary letter of award dated 31 July 2009 (see pp 8–9 in Bundle A6); and that the defendant had duly paid HK Jaya and/or its subcontractors or suppliers via telegraphic transfers or cheques as instructed by HK Jaya, the defendant denied the entire arrangements as pleaded by the plaintiff. The defendant claimed that HK Jaya had in fact failed to carry out the said project which had been awarded to HK Jaya on a turnkey basis. When this happened, the defendant terminated the agreement with HK Jaya (see letter dated 7 June 2010 in exh 'D9') and proceeded to undertake the works under the said project itself.

[7] When it took over the said project, the defendant conducted a valuation of the total value of the works done by HK Jaya on 19 June 2010. It found that it had overpaid HK Jaya by some substantial sum — see exhs 'D10', 'D11', 'D12' and 'D13'. The defendant then liaised directly with the plaintiff. The defendant purchased materials such as metal door hinges and frames as well as industrial diesel directly from the plaintiff. However, the defendant claimed that it had fully paid for such purchases. In fact, the defendant claimed that it made an advance payment of RM5,000 for door frames which the plaintiff failed to supply. The defendant's counterclaim is for the return of that sum.

[8] Specifically, and in relation to the purported letter of undertaking, the defendant denied issuance of the same. The defendant alleged that the said letter was a fraud on the defendant and/or it was fraudulently issued. A host of reasons were cited.

[9] First, the defendant, inter alia, alleged that the said letter was not written on its proper letterhead. Second, the defendant denied that the signatory of the said letter of undertaking, Chua Hui Sen, is a director of the defendant; that she was not authorised to sign on behalf of the defendant and neither was there a board of director's resolution for that purpose; that the signature in any event is not Chua Hui Sen's and a police report to that effect had been lodged. In short, the defendant alleged that the said letter of undertaking was a forged document falsely created to cheat the defendant.

[10] This was denied by the plaintiff who claimed that the alleged overpayment was an afterthought as it arose only after the plaintiff had issued a notice under s 218 of the Companies Act 1965 for recovery of the debt. The plaintiff maintained that Chua Hui Sen was a director of the defendant with 100,000 shares in the defendant. She is said to be authorised to enter into transactions on behalf of the defendant in which case, the defendant was estopped from contending otherwise.

SUMMARY OF TESTIMONIES

[11] The court heard oral testimonies from both parties including two experts on handwriting; and further considered documentary evidence. This is a summary of the testimonies.

[12] Five witnesses testified for the plaintiff. The first was Chua Sin Han ('PW1'). 'PW2'. Pang Chan Kok, is the 'forensic handwriting and questioned document examiner' called by the plaintiff. I shall deal with his evidence together with that of Lim Yok Chaw ('DW1'), the 'forensic document examiner' called by the defendant, later.

[13] PW1 claimed to be the project director of the said project and that he was involved very early on in the project. He claimed that it was he who selected HK Jaya as the subcontractor for the said project. He offered copies of progress reports in support of his claim. He further referred to minutes of site meetings where he was recorded as attending on behalf of the defendant.

[14] In respect of the said letter of undertaking, he explained how it came about. He told the court that he met Steven Jay Ong ('PW4') and Chai Wei Chuan ('PW5') at PW4's office on 31 July 2009 'to discuss on how Desa Watan can assist HK Jaya Sdn Bhd to pay the outstanding debt to T-Smart Sdn Bhd to ensure that there is no delay in the supply of construction material to HK Jaya Sdn Bhd which will, as a consequence, cause delay on the progress to the Project'. Apparently, HK Jaya was having financial difficulties and was trying to secure a bank loan to finance the short fall faced at that time due to increased costs of overheads. Various options were discussed before the parties agreed on the letter of undertaking.

[15] PW1 told the court that he approached Lye Siang Long ('DW2') who was the Finance Director of Digistar Holdings Bhd, who agreed to give a letter of undertaking 'to be signed by Chua Hui Sen in the usual course of business' (see notes of proceedings dated 27 March 2013 at p 110). He told the court that this letter was prepared by the defendant but PW1 did not say who in the defendant company actually prepared that letter.

[16] PW3, Yeong Mun Kien, claimed to be the defendant's project manager 'from the beginning of 2008 until end of August 2009. Thereafter April 2009 I was involved only in preparing the interim claim for submission to the project architect, Focus Architects and Urban Planners Sdn Bhd until June 2010 for Desa Watan Sdn Bhd'. His evidence was largely to deal with the claims and payments made by the defendant to HK Jaya, PW1, and to a company known as Visage Holdings Sdn Bhd. Those documents are found in Bundle A6. PW1 is the Chief Executive Officer of Visage Holdings Sdn Bhd.

[17] PW3 claimed that the documents in Bundle A6 were prepared based on a sample format as instructed by Lye Siang Long (DW2) pursuant to a meeting on 10 April 2009 at Lye's office. That meeting was chaired by DW2. Besides PW3, PW1 and one Mr KC Lee were also present. PW3 claimed that he met DW2 and KC Lee for the first time at that meeting. At that meeting, PW3 said that DW2 wanted 'to establish the flow of documents pertaining to progress claims and payments among the parties concerned'.

[18] According to him, DW2 asked him 'to get HK Jaya Sdn Bhd to prepare and submit progress claims to Desa Watan Sdn Bhd at the same amount of claims to Yayasan Melaka as per Mr Lye Siang Long instructions. I was also given 2 sample letters containing HK Jaya Sdn Bhd's name and address to be followed by HK Jaya Sdn Bhd to Desa Watan Sdn Bhd on progress claims. During the meeting there was a schedule of the claims prepared by Mr Lye Siang Long and Mr KC Lee given to me which I was looking for the first time and was surprised. I was told to do it and Mr Lye Siang Long mentioned to us that the cash payment that was given to Mr Chua Sin Han and Visage Holdings Sdn Bhd was for Datuk Lee Wah Chong'.

[19] Next, was Steven Jay Ong (PW4); the director of HK Jaya having charge of the said project. He testified that the goods claimed by the plaintiff were all delivered to and received by HK Jaya. He admitted that the total sum of RM2,438,658.71 was due and outstanding from HK Jaya. Aside from that, PW2 too, testified that there was a discussion at his office on 31 July 2009 for the purpose as testified by PW1. He confirmed the names of the three attendees. PW4 told the court that the meeting was 'to discuss how Desa Watan Sdn Bhd can assist HK Jaya Sdn Bhd to pay the outstanding debt to T-Smart Sdn Bhd to ensure that there is no delay in the supply of construction material to HK Jaya Sdn Bhd which will, as a consequence, cause delay in the progress of the Project'. He told the court that after the letter of undertaking was given, a further document, that is, a supplemental agreement dated 31 July 2009 was given by the defendant; and that the defendant 'was supposed to come into my shoe and take over the project'.

[20] Finally, there was Chai Wei Chuan, PW5. He is a director of the plaintiff. He testified and confirmed the outstanding sums due from HK Jaya. He was the one who went to see PW4 for payment and he was told by PW4 that HK Jaya was 'having some financial difficulties and he brought me to see Mr Chua Sin Han the Project Director from Desa Watan Sdn Bhd. The three of us discussed about the payment and Desa Watan Sdn Bhd requested me to continue supplying the building materials otherwise the project will fail. Desa Watan Sdn Bhd agreed to undertake to pay me directly and I requested for a written confirmation. That is where they issued me the Letter of Undertaking. So, I continued supplying the building materials'. He confirmed that the meeting was held at HK Jaya's office. He also confirmed that PW1 and PW4 were at that meeting. It was PW5's testimony that PW1 and PW4 'issued' him the letter of undertaking at that meeting of 31 July 2009.

[21] Two witnesses were called by the defendant. As mentioned, the first was Lim Yok Chaw (DW1), the handwriting expert. The second was Lye Siang Long (DW2). He is a director of the defendant. He testified on how the defendant won the contract for the said project and how HK Jaya was appointed. He also testified as to how a supplemental letter of award was issued on 31 July 2009 when HK Jaya was unable to complete in time. Under the supplemental letter of award, HK Jaya was required to complete by 5 June 2010.

[22] DW2 told the court about how the defendant set about dealing with the plaintiff directly after the termination of HK Jaya's appointment as turnkey contractor; but the defendant had duly paid the plaintiff for the materials supplied. It was DW2's evidence that he and the defendant had no knowledge of the existence of the letter of undertaking. The first time the defendant learnt of its existence was when a petition to wind up the defendant was presented. That petition was successfully challenged on the ground that the debt was disputed as the veracity of the letter of undertaking was highly suspect.

[23] DW2 testified that a police report had been lodged upon learning of the existence of the letter of undertaking. It was his evidence that Chua Hui Sen was no longer a director at the time of the letter of undertaking and that she had never been authorised to sign any such letter. There were furthermore, no resolutions passed by the board of directors of the defendant for this purpose.

[24] Further, upon learning of the existence of this letter, he had the letter examined by a forensic expert. This led to DW1's report. DW2 also denied that PW1 and PW3 were ever employed by the defendant. It was his belief that PW1 was a subcontractor of HK Jaya.

[25] DW2 also testified that the present claim relates to goods or materials ordered by HK Jaya and that the defendant had fully paid HK Jaya for such purchases. In fact, it claimed there was some overpayment which was discovered after HK Jaya was terminated as the turnkey contractor and a valuation of its works was conducted. However, the defendant decided not to pursue the matter since HK Jaya had been wound up. The defendant was however pursuing its recovery of RM5,000 which it had paid the plaintiff as advance for door frames ordered. The frames were allegedly not supplied by the plaintiff.

[26] Relying on DW2's evidence and the report of DW1, the defendant urged the court to dismiss the claim; and allow its counterclaim.

DETERMINATION

[27] It must first be appreciated that the debt for the amount claimed by the plaintiff is owed by HK Jaya. It is not owed by the defendant in the sense that it was not ordered by the defendant at the material time. That was admitted by PW4 who was a director of HK Jaya, which has since been wound up. It was following HK Jaya's difficulties in settling these outstanding sums that the defendant was supposedly approached. A meeting is said to have taken place on 31 July 2009 at the office of HK Jaya. The attendees of that meeting were PW4, PW1 and PW5. It is at that meeting that a letter of undertaking is said to have been agreed upon. It is the plaintiff's claim that the defendant had, inter alia, agreed, in that letter of undertaking that it will pay the plaintiff in the event HK Jaya does not pay. Since HK Jaya has not paid, and with its liquidation, the plaintiff is now turning to the defendant for recovery. The essence of the defence to this claim is the authenticity of the letter.

[28] It can therefore be seen that the primary issue here concerns the validity of that purported letter of undertaking. Upon careful evaluation of the oral and documentary evidence before the court, the court agreed with the defendant's case and finds that the letter of undertaking is indeed forged. These are the reasons for the court's findings.

[29] The letter of undertaking is said to be signed by one Chua Hui Sen. She is said to be a director of the defendant holding 100,000 shares in the defendant at the material time. This is that critical letter of undertaking dated 11 August 2009:

Dear Sir,

CADANGAN MEMBINA DAN MENYIAPKAN 4 BLOK PANGSAPURI KOS RENDAH SETINGGI 17 TINGKAT, SEBUAH SURAU, SEBUAH MEDAN SELERA, 3 KEBUK SAMPAH DAN SEBUAH PONDOK PENGAWAL DI ATAS LOT 162, KAWASAN BANDAR VIII, DAERAH MELAKA TENGAH, MELAKA UNTUK TETUAN YAYASAN MELAKA

Re: Letter of Undertaking

We refer to our meeting on the 31 July 2009, where we discussed the payment proposal of the amount owing by HK Jaya Sdn Bhd to you and our request for your continued supply for the above project.

We are confident HK Jaya Sdn Bhd will complete this project by February 2011 and they would be in the position to pay you latest by 30th April 2011. As such, we urge you to ensure continued supply for the project and promise you that if HK Jaya Sdn Bhd does not settle all the outstanding payment due to you by the said date, we will pay you to a maximum limit of RM2,500,000.00, the latest by the 30th May 2011 as long as HK Jaya Sdn Bhd confirms the amount due and owing to you.

Thank you.

Yours faithfully,

DESA WATAN SDN BHD

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(Chua Hui Sen)

Director

[30] This was PW1's testimony on this letter. He testified that Chua Hui Sen was '... empowered by Desa Watan to sign 3 commitment letters' which later transpired to be at least five such letters. The first was the letter of award to HK Jaya amounting to 53m; the second was the letter of acceptance for the appointment of consultant architect, Focus Architect for the project; third was the letter appointing the civil and structural engineer for the project; fourth, the letter appointing the mechanical and electrical engineer; and fifth, the appointment of Itwan Piling and Construction as the piling contractor.

[31] It was PW1's evidence that he approached Lye Siang Loong, Finance Director of Digital Holdings Bhd who agreed to give a letter of undertaking 'to be signed by Chua Hui Sen in the usual course of business' (see notes of proceedings dated 27 March 2013 at p 110). He also told the court that this letter of undertaking was prepared by the defendant. The precise name of the individual who prepared the letter was however, not made known.

[32] In cross-examination, PW1 informed the court that Chua Hui Sen was actually his daughter. She is presently in the United States. PW1 told the court that he has no idea where she is precisely in the States as she is said to be travelling. He also informed the court that although he had no way of contacting his daughter as she was the one who would initiate the contact, his other children would be able to contact her. According to PW1, Chua Hui Sen was a shareholder and director of the defendant at the material time.

[33] Through DW2, the defendant claimed that Chua Hui Sen was no longer a director at the relevant time of the letter, and that she was not authorised to sign such letters in any case.

[34] Neither party called Chua Hui Sen to testify; each arguing that it was the responsibility of the other to call or subpoena her to court to testify.

[35] First of all, it goes almost without saying that the plaintiff bears the burden of proving that the letter of undertaking was indeed signed by the person whose name appears in the letter. Here, Chua Hui Sen is said to have signed as a director of the defendant. The plaintiff must prove that there is such a person by this name; and that the person is a director of the defendant. This must be done so that the plaintiff may be said to be going about establishing its case against the defendant. There are no presumptions in such matters; there is no presumption that a person is a director of a company until and unless shown otherwise. It is still a matter or detail to be proven.

[36] Generally, such proof is attended to easily by calling the signatory to testify. All that a party needs to do is therefore call Chua Hui Sen herself to testify. She did not because she was not called or subpoenaed. It is the court's view that she ought to have been called by the plaintiff. The plaintiff did not call her and no explanations were forthcoming in this regard. All that the plaintiff said was that the court ought to accept the testimony of PW1 *in toto* because he is an independent witness by virtue of the fact that he is a subpoenaed witness.

[37] With respect, the court disagrees. It is not open to and not sufficient for the plaintiff, through PW1, to say so without more, particularly where PW1 is himself not a director of the defendant; and where the matter is challenged or disputed, as is the case here. The credibility, veracity and weight to be given to the testimony of any witness are also not determined by the fact that a witness attends court in response to a writ of subpoena. Certainly, that fact alone is insufficient.

[38] Here, it must not be ignored that even the role of PW1 has been challenged. PW1's claim that he was the project director of this project was

disputed by the defendant. In support of his claim, PW1 testified that he was involved in negotiating with Yayasan Melaka and Kumpulan Melaka Bhd, the latter the party in joint venture with the defendant in this project. He also claimed to have been mandated to select the subcontractor for the project; and he chose HK Jaya. He produced photocopies of progress reports of the project and relied on the testimonies of the other witnesses in support of his claim.

[39] In my view, being in possession of progress reports and in this case only photocopies of progress reports does not render any person as necessarily and conclusively a project director of any project. Other than PW1's claim, there is no evidence to suggest that PW1 or even PW3 for that matter were ever on the defendant's payroll.

[40] From a careful scrutiny of the evidence presented, it would appear that PW1 may have been involved in the said project. This involvement was not however, on the defendant's behalf or as its mandated and authorised personnel. More likely than not, it was on behalf of Visage Holdings Sdn Bhd, a company in which PW1 is a shareholder and is its chief executive officer. It may even be said that PW1 was representing HK Jaya seeing that PW5 turned to him instead of PW4 when discussing the position and settlement of HK Jaya's outstanding debts at the material time. At that time, as it is now, the debt was always HK Jaya's to bear. But for the letter of undertaking, there would be no basis for the plaintiff to turn to the defendant for payment. The reference to PW1 therefore, must have been in relation to HK Jaya and/or Visage Holdings; and not the defendant.

[41] Further, there is PW3 and DW2's testimonies on the payments by the defendant to HK Jaya and to Visage Holdings. This arrangement of payments is indirectly confirmed by DW2 who explained that under the arrangements agreed between the defendant and HK Jaya at the material time, all payments by the defendant for work done by HK Jaya were to be apportioned and paid into several accounts. One belonging to HK Jaya; another to that of a company known as Visage Holdings. This pattern of payments continued for a total of 16 interim payments and this is reflected in the statement of accounts tendered. Two letters dated 23 September 2008 and 25 September 2008 as found at pp 22–23 of Bundle A6 were also identified.

[42] The court is satisfied with the defendant's version of the facts as it is supported by contemporaneous documentary evidence. Although PW3 had attempted to explain that this was upon the directions of the defendant (DW2), the evidence show that payments were made to PW1. More importantly, PW1 did not deny receipt of these monies except to say that the monies were rechanneled back to the defendant.

[43] From both PW3 and DW2's explanations on these payments, it is the court's findings that it is more plausible than not that PW3 as well as PW1, were not the defendant's employees. In the case of PW3, he was in fact engaged by PW1.

[44] Aside from the payments to PW1 and/or Visage Holdings, the testimonies of PW4 and PW5 further attest to this conclusion. These two witnesses did not question PW1's claim as the defendant's representative or mandated personnel when they ought to have done so. Both PW4 and PW5 also never saw any name or calling cards from PW1 holding him out as the project director of the defendant. It would be reasonable to say that since payments were being made to Visage Holdings, a company which apparently had nothing to do with the said project insofar as the defendant was concerned as its contract was undisputedly with HK Jaya, PW4 and PW5 ought to have been concerned with and clarified the capacity of PW1 at the material time of dealings.

[45] In such circumstances, I agree with the defendant that the plaintiff must call Chua Hui Sen to testify. Since the plaintiff did not, and did not offer any reason, cogent or otherwise, the conditions for invoking an adverse inference against the plaintiff present. This position was reiterated by the Court of Appeal recently in its decision in *SBB Securities Sdn Bhd v Chan Kwan Foong* [2013] 5 CLJ 590. The court is entitled under these conditions draw an inference adverse to the plaintiff that is, Chua Hui Sen was not produced in court because if she was so produced, her testimony would not be favourable to the plaintiff. In short, she would have confirmed the defendant's version of the facts.

[46] The issue of whether a person is or is not a director of any company may also be resolved by offering the results of official searches at the companies register. In this case, such a search was done by the plaintiff and the results can be seen in an affidavit affirmed by PW5, Chai Wei Chuan on 15 July 2013 — encl 74. This affidavit was filed in relation to an earlier application for an ex parte injunction before this court. That application was dismissed. There is no appeal in relation to that application.

[47] In his affidavit, PW5 had exhibited SSM search results dated 8 July 2013. At p 3 of the search, the defendant's directors are:

Mohd Zaman Khan @ Hassan bin Rahim Khan Datuk	(appointed 5 June 2011)
Lye Siang Long	(appointed 3 September 2007)

Lee Poh Chau	(appointed 8 September 2010)

[48] It is quite obvious from this search conducted by the plaintiff itself that Chua Hui Sen was not a director of the defendant at the material time of the letter of undertaking of 11 August 2009. She was only a shareholder holding 100,000 shares as seen from p 4 of the results of the same search.

[49] Aside from this, there is also the defendant's reports and financial statements for the financial year ended 31 March 2010 — see pp 75–92 of Bundle A. In this report which is for the financial year ended 31 March 2010 and which covers the date of the letter, that is 11 August 2009, the defendant had only two directors; namely, Lye Siang Long and Nik Ahmad Tadjuddin bin Nik Mustapha — see pp 76–79 of Bundle A. Again, Chua Hui Sen was not named as director.

[50] It would therefore appear from these two pieces of evidence, one of which is from the plaintiff itself; the signatory of the letter of undertaking was not a director of the defendant. That being the case, the credibility of the letter is in grave and serious doubt.

[51] In relation to the authenticity of the letter of undertaking, the court agreed with and accepted the testimony of DW1, the document examiner called by the defendant who concluded that the letter of undertaking was not signed by Chua Hui Sen.

[52] This was PW2's evidence. PW2's report can be found in exh 'P8' and it is entitled 'Review of Signature Verification Preliminary Report of Lim Yok Chaw'. PW2 did not examine any of the signatures but had instead examined the report prepared by the defendant's handwriting expert and given his advice 'on the correctness or otherwise of the methodologies … employed' by Lim Yok Chaw. According to his report dated 21 March 2013, his 'review' of the defendant's expert's report is 'based on a pictorial assessment of the questioned and specimen signatures'. He, admittedly, states in his report that he has 'not undertaken an independent examination of this matter. Hence, I am not in the position to advise you whether the expert's opinions are correct or not. All I am doing is advising you on the correctness or otherwise of the methodologies he employed'.

[53] In that regard, PW2 made 'General Comments' from several perspectives before offering what is known as 'Reporting Conclusions'. First, he commented on the fact that the specimen and questioned signatures appeared on photocopies as opposed to originals. Although Lim Yok Chaw had expressed that the questioned signature 'Q1' to be a clear and a good

photocopied impression, PW2 noted that Lim had not commented about the quality of the specimen signatures 'S1' to 'S6'. According to him, establishing the quality of photocopies was necessary as the features of speed and fluency of a signature and other inherent qualities that help an examiner determine whether or not the questioned signatures could be the product of some form of simulation process or evidence that the signature is genuine 'cannot be properly assessed in poor quality copy documents'. Photocopies, being reproductions also do not reproduce inherent details such as writing pressure, line quality which are 'evidence of the indicia of forgery' and which are examined under a microscope. PW2 was therefore of the view that 'Many examiners will not even copy documents as they feel any conclusion that is expressed, no matter how watered down it is; the chance of it being wrong is just too great'.

[54] PW2 next commented on the number of specimens examined. Here, PW2 remarked that he would have recommended ten although five was the bare minimum. PW2 further on the terminology used by DW1; that DW1's conclusion of 'positive indicative in regards to the questioned signature is not a scientific terminology and not one of the nine levels of probability statements used by forensic laboratories'. With these comments, PW2 then appended 'Reporting Conclusions' that he said was 'used by the FBI and adopted by many laboratories worldwide'. Some nine criteria were offered before PW2 concluded with the remarks pointed out earlier; that he is 'not in the position to advise ... whether the expert's opinions are correct or not' and all that he is 'doing is advising ... on the correctness or otherwise of the methodologies' that Lim Yok Chaw employed.

[55] This was the evidence of DW1 who is a forensic document examiner. He was given photocopies of the following documents by the defendant's solicitors:

(a) a photocopy of the said letter of undertaking which he referred to as the 'Disputed Document' as the signature thereon which he marked as 'Q1' in his report was disputed;

(b) two photocopies of the defendant's directors' circular resolution pertaining to opening of bank account dated 11 February 2008;

(c) a photocopy of a business account application form of OCBC bank dated 11 February 2008; and

(d) a photocopy of a cashier's order/draft application form of OCBC Bank dated 28 February 2008.

[56] The documents in (a), (b) and (c) above were referred to as 'Specimen Documents' and the signatures appearing in these documents were marked as 'S1' to 'S6' in DW1's report as they were the specimen signatures.

[57] According to his evidence-in-chief, he was asked to 'examine, compare and verify as to whether or not the signature as contained in the Disputed Document is that of Chua Hui Sen in comparison with the Specimen Signatures contained in the Specimen Documents'. He categorically stated that the photocopies of the documents that he had to examine were 'clear and good containing good and clear photocopied impressions of the signatures to be examined'. Recognising that he was examining photocopied documents, he went on to say:

> Photocopying is a reproduction process which is not able to fully capture the finer details of signatures such as line fluency, line crossing and pen pressure. In addition, evidence of traced forgery could not be properly assessed from photocopied impressions of signatures ....

[58] Consequently, he limited his assessment of the specimen and disputed signatures to 'noted features in their letter designs and structural formation'. Using this assessment, he was nevertheless able to determine whether a signature is forged 'to a certain level of conclusion on a qualitative scale'.

[59] From his examination of first, the specimen signatures, he said that he 'did not find any fundamental, significant and consistent difference' between all the specimen signatures and in his opinion, these signatures, 'S1' to 'S6' were 'most probably of a common authorship'. By comparison, he found the disputed signature 'to be pictorially similar in appearance to the specimen signatures' and further 'found the disputed signatures to show differences in the noted features of its letter designs and structural formation from those of the said specimen signatures'. Details of DW1's examination and findings can be found at pp of 5–8 of his report which he concluded as follow:

> I found the abovementioned differences in the noted features of letter designs and structural formation between the disputed signature 'A1' and the specimen signatures 'S1' to 'S6' to be fundamental, significant and consistent. I am of the opinion that the disputed signature 'Q1' on the photocopy of the letter 'Re: Letter of Undertaking' from Desa Watan Sdn Bhd to T-Smart Sdn Bhd dated 11-8-2009 and the specimen signatures 'S1' to 'S6' on the specimen signatures are positively indicative of different authorship.

[60] In short, DW1 was of the opinion that the letter of undertaking was not genuine.

[61] The examination of signatures in particular, is not an exact science. It is a matter of opinion that even the court can form and conclude. This is in accordance with s 51 read together s 67 of the Evidence Act 1950. See the Court of Appeal's decision in *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85. Be that as it may, the crux of PW2's criticisms of DW1's findings lie in the specimens that DW1 had used and relied on to do the

comparisons and draw some reasonable and intelligible conclusions. It was PW2's testimony that examinations and evaluations of photocopies are unsafe and thereby unreliable due to the various chemical processes etc along the way.

[62] Having heard and evaluated the evidence of both document examiners, PW2 and DW1, with respect, the court did not find PW2's evidence of much assistance. At the end of the day, PW2 had chosen to comment on the methodology used by DW1 in evaluating how genuine and authentic is the purported signature of Chua Hui Sen as found in the letter of undertaking; as opposed to giving an expert evaluation of the signature itself. It is unclear why he had chosen to do that. Perhaps, those were his instructions. In my view, PW2's testimony remains substantially academic and theoretical to the point of being hypothetical; and irrelevant for consideration in the present facts.

[63] In any event, PW2's critique of DW1's report and DW1's methodology has been adequately, satisfactorily and, admirably countered by DW1 in the appendix to his report.

[64] On the examination of photocopies as opposed to originals, this was countered by DW1 who testified that he frequently examined photocopies; if that was all that was made available. In my view, PW2's opinion on this is suspect given that he has not even ventured to say that the copies examined on by DW1 were 'poor quality copy documents'. Since that is not said to be the case, PW2's view is entirely hypothetical and irrelevant here.

[65] As for the number of copies or signatures examined, again, there is nothing to be made of this. Here, six specimens were taken. It is more than the bare minimum; and there is nothing shown or even suggested that the six taken lacked quality or are insufficient rendering any examination and conclusion drawn unreasonable or unsafe.

[66] Insofar as DW1's testimony is concerned, the court found it fair and credible. After comparing the specimen signature with that under scrutiny, the court indeed found the signatures to be materially different such that it can be concluded that the impugned signature as seen in the letter of undertaking, bears a different authorship. The court therefore accepted the evidence of DW1 that the letter of undertaking was indeed, not written by Chua Hui Sen.

[67] There are other reasons for rejecting the authenticity of the letter. In the first place, if such a letter was indeed signed by Chua Hui Sen, the court would have heard evidence to that effect. Instead, at no time was the court told, even by PW1 that he had observed his daughter signing the letter of undertaking. Given that he was in a way representing his daughter's alleged interests, it would be reasonable to expect PW1 to tell the court that he was present when

his daughter signed the letter. In fact, in his evidence-in-chief, PW1 told the court that Lye Siang Loong agreed to give a letter of undertaking. He is said to have instructed the defendant 'to give a letter of undertaking dated 11.8.2009 to be signed by Chua Hui Sen in the usual course of business'. PW1 added that Chua Hui Sen had been 'empowered' or 'given the power' by the defendant to sign three commitment letters appointing HK Jaya and several others such as the consultant architect, the civil and structural engineer and; the mechanical and electrical engineer. The letter of undertaking is said to have been prepared by the defendant.

[68] Yet, PW1 never identified this letter of undertaking as one of the three or five commitment letters signed by his daughter. In any case, those letters signed by his daughter were all signed some time in 2008 while this letter is dated 1 August 2009.

[69] Another factor that brought real concerns and doubt to the genuineness of this letter was the manner this letter was purportedly procured.

[70] According to PW4, the meeting of 31 July 2009 was to 'discuss on how Desa Watan Sdn Bhd can assist HK Jaya Sdn Bhd to pay the outstanding debt to T-Smart Sdn Bhd to ensure that there is no delay in the supply of construction material to HK Jaya Sdn Bhd which will, as a consequence, cause delay in the progress of the project'. It was said that after this meeting, a supplemental agreement dated 31 July 2009 was signed between HK Jaya and the defendant. This supplemental agreement was to enable the defendant 'to step into my shoes and take over the project'. This supplemental agreement that PW4 spoke of was the supplemental letter of award dated 31 July 2009. This letter amended and modified the earlier letter of award dated 15 March 2008.

[71] Now, the first letter of award to HK Jaya dated 15 March 2008 was signed by Chua Hui Sen. The supplemental letter of award was signed by two persons authorised by the defendant. One of those signatures belongs to DW2 while the other, though not identified, is certainly not Chua Hui Sen's.

[72] Given that the supplemental letter of award was signed also on 31 July 2009, the date of the meeting, it is somewhat peculiar that the letter of undertaking should be signed by Chua Hui Sen, a person other than the two signatories of the supplemental letter of award. It is reasonable to expect the signatory(ies) to be one or both of those same persons.

[73] Another telling fact relates to when this letter of undertaking was supposedly procured. The supplemental letter of award can be seen at pp 8–9 of Bundle A6. Steven Jay Ong or PW4 signed on behalf of HK Jaya. He signed

it on 31 July 2009. This is the same day that he supposedly attended a meeting at his own office and where the discussions on the letter of undertaking took place. Now, PW4 had testified that the supplemental letter of award was given to him after the letter of undertaking was given. Amongst others, the supplemental letter of award serves to include additional paragraphs pertaining to the completion date, that extensions would require the written consent from Yayasan Melaka.

[74] In this regard, I find PW4's testimony not in the least, believable. First, chronologically, PW4's evidence does not make any sense. From the dates of these two documents, it would show that his evidence is untrue. The letter of undertaking is dated 11 August 2009 while the supplemental letter of award which was signed in front of an advocate and solicitor (Selma Enolil Mustapha), is dated 31 July 2009. That is the same date as the date of the meeting where the letter was first discussed and supposedly agreed.

[75] In the supplemental letter of award, the date of completion is clearly stated as 5 June 2010 and that extensions required the written consent from Yayasan Melaka. Yet, in the letter of undertaking, the defendant is said to be 'confident that HK Jaya will complete this project by February 2011'. If, as testified by PW4, the letter of undertaking was given before the supplemental letter of award, it would be safe and reasonable to say that the defendant could not have made such an obvious error as to a matter as important as the completion date of a project. The date of completion of the project as mentioned in the second paragraph is clearly erroneous. This material inconsistency in these two documents was not explained or clarified.

[76] I must add that that the court did not find PW5 a credible witness. In his evidence-in-chief, he had said that PW1 and PW4 had 'issued' him the letter of undertaking at the discussion held at HK Jaya Sdn Bhd's office sometime in July 2009. So I continued supplying the building materials. By 'issued', it is quite clear that the witness meant being in possession of the letter of undertaking; and he said so in answer to the next question — see Q & A 68. Yet, he told the court that these two persons 'passed me the letter of undertaking. It was sometime in August 2009'. This evidence is inconsistent and makes no sense. If the letter of undertaking was already issued and given 'sometime July 2009', then PW5's latter answer is incorrect. If the letter was only 'passed ... sometime August 2009', then it would appear that the plaintiff continued to supply to HK Jaya not on the strength of the letter of undertaking, but some promise on the part of PW1 and PW4. This disparity is significant as it lends weight and basis to the defendant's concerns on the authenticity of this purported letter of undertaking.

[77] Next, the contents of the letter. The opening words of the letter refers to a meeting already held and attended by certain individuals of the two parties where certain matters were said to have been agreed:

> We refer to our meeting on the 31st July 2009, where we discussed the payment proposal of the amount owing by HK Jaya Sdn Bhd to you and our request for your continued supply for the above project.

[78] Amongst the persons who allegedly attended that fateful meeting were PW3 and PW4. Yet, none of them saw Chua Hui Sen at that meeting. In fact, they do not even know who she is. On this same note, it is palpable that even PW1, father of Chua Hui Sen did not say that his daughter attended the meeting referred to in the opening paragraph of this letter. Aside from this, the other attendees at the meeting categorically and confidently testified that Chua Hui Sen did not attend the meeting referred to in the opening paragraph of this letter.

[79] Since this letter is more in the nature of a follow up from a meeting already held between the parties, it would be reasonable to say that the contents of the letter and the intention of the letter must have been to confirm what transpired at the meeting. Given that Chua Hui Sen did not attend the meeting, as testified by the plaintiff's own witnesses, then the very object of the letter fails. There can be no confirmation by a person who never attended the meeting in the first place.

[80] Another factor that weighed against the credibility of this letter is that although PW1 had testified that he had had a discussion with DW2 on the provision of the letter, this was never asked of DW2. This witness was never asked to confirm PW1's allegation. In fact, he was not asked any questions on any meeting between him and PW1. It was the evidence of the plaintiff's witnesses that the provision of the letter was agreed at a meeting attended by PW1, PW4 and PW5. Neither DW2 nor any other representative of the defendant attended that meeting. Therefore, if the court rejects the role of PW1 that he was the defendant's project director (and it is unusual that there is a project manager and a project director here, both performing similar functions), and finds that he was not the defendant's representative, then there was really no subsequent meeting between PW1 and DW2. That being so, the whole idea of providing this letter of undertaking was entirely PW1's doing, for whatever reason he might have had. Those reasons, if any, furthermore, had nothing to do with the defendant. I view the failure to cross-examine DW2 on this as material. The defendant has not had an opportunity to deal with this.

[81] A final observation. If indeed such a letter of undertaking existed at the material time, it is curious as to why the plaintiff made no mention of it or more important, the sum which is no small sum, at the time when the

defendant took over the said project and ordered directly from the plaintiff. There is no explanation; leaving the court with the only reasonable conclusion that may be drawn; and that is, that the letter did not exist in the first place.

[82] As testified by DW2, the first time he learnt of the existence of this letter was during the winding up proceedings. In any case, DW2 was not cross-examined as to the meeting that PW1 claimed that he had with him. In the totality of the evidence, the court must agree with the defendant that the letter of undertaking is not genuine and not signed by a director of the defendant; and not signed by an authorised person of the defendant. The letter of undertaking must therefore be rejected.

[83] On the other hand, the invoices and statements issued by the plaintiff itself are consistent with the defendant's case. Following the defendant's takeover of the said project in June 2010, when HK Jaya had not completed as agreed under the supplemental letter of award, the defendant ordered directly from the plaintiff. The documents tendered satisfactorily show the parties before the court dealing directly with one another. In none of the correspondence or documents exchanged between each other did the plaintiff raise the debt of HK Jaya.

[84] Having rejected the letter of undertaking, the basis of the plaintiff's claim therefore falls. This is aside from the fact that the plaintiff is unable to establish the precise amount of the sum owed.

[85] As for the counterclaim, the court is satisfied that the sum of RM5,000 was paid to the plaintiff and for which no service or goods were rendered or delivered. This was in fact admitted by PW5. The said sum should be returned to the defendant accordingly.

[86] In the circumstances, the plaintiff's claim is dismissed while the counterclaim of the defendant is allowed. The court further orders the plaintiff to pay the defendant the single amount of RM100,000 as costs. The plaintiff had proposed the sum of RM300,000 whereas the defendant had proposed the sum of RM100,000. The court agrees with the defendant's proposal which is found to be reasonable and appropriate in the facts and circumstances of this case. There is no need for the court to make any order in respect of the third party claim against Chua Hui Sen in view of the court's findings and orders.

Claim dismissed and counterclaim allowed.

Reported by Afiq Mohamad Noor